Filed 10/2/12 P. v. Moultrie CA2/1

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. VONDRE DEAN MOULTRIE, Defendant and Appellant.	B232595 (Los Angeles County Super. Ct. No. TA112788)

APPEAL from an order of the Superior Court of Los Angeles County. Gary E. Daigh, Judge. Affirmed as modified. Remanded with directions.

Carol S. Boyk, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Jonathan J. Kline, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Vondre Dean Moultrie appeals from the judgment entered following a jury trial in which he was convicted of several robberies. He contends the trial court erred by failing to dismiss a juror for concealment of bias, by failing to reduce vicarious arming enhancements to lesser included violations, and by awarding victim restitution in an amount greater than was established at trial. We affirm the convictions but direct that the sentence be modified.

BACKGROUND

On January 24, 2010, defendant, accompanied by a man armed with a gun, entered the Topanga T-Mobile store and demanded money from the store's safe and five cash registers. When an employee was unable initially to open the safe, defendant shouted, "Shoot him, shoot him." The assailants also demanded the wallet of Joshua Hitz, a store employee. After obtaining it they ordered him to the floor, then left. Hitz later identified defendant from a photo array. A surveillance video was taken from the store's security camera and was played at the preliminary hearing and trial.

On January 31, 2010, defendant entered another T-Mobile store, in El Segundo, where he grabbed Casshay Lecesne, an employee, pressed what felt to her like a gun against her neck, and demanded that she take him to the safe. Lecesne gave defendant the contents of the safe, and he left. A video of the robbery was taken from the store's security camera and showed to Hitz, who identified defendant as one of the men depicted in the video.

The jury convicted defendant of four counts of robbery (including counts 6 and 7, which will be discussed below) and one count of attempted robbery (count 8). The jury found defendant had participated in the first robbery knowing that his co-assailant was armed with a gun but found he was not personally armed in any of the robberies. (Pen. Code, §§ 12022, subd. (d); 12022.53; undesignated statutory references are to the Penal Code.) The court denied probation and sentenced defendant to 29 years and eight months in prison, which included weapons enhancements of three years on count 6 and eight months each on counts 7 and 8. It also ordered defendant to pay $8,888.67 in direct victim restitution to T-Mobile.

DISCUSSION

A. Juror Bias

During jury selection the trial court read the charges to the prospective jurors. After basic biographical information was obtained, the prospective jurors were twice asked whether they could be fair and whether there was anything they should mention that would affect their fairness. The prosecutor asked: "Are there any of the rest of you other than what you've already told us that feel that there's something that we need to know? Because as you understand, this is a very important job that we are asking of you and all we're looking for here is to find people that could be fair and unbiased, that will pay attention to the evidence and, you know, come to a reasonable conclusion. [¶] Are there any of the others of you that are sitting here that feel like you have any issues with any of that?"

Prospective juror No. 5367, who was later seated and sworn as Juror No. 5 remained silent.

Seven prospective jurors were excused after revealing possible bias against one side or the other. Eight more were excused upon the exercise of peremptory challenges, four by each side.

After the jury was empanelled but before alternates were chosen, Juror No. 5 met with the trial judge and trial counsel in chambers, where the following dialogue occurred:

"The Court: . . . The bailiff just indicated that—he told me what city you lived in. You thought maybe some friends or relatives of the defendant lived near there and you were concerned.

"Juror No. 5: Yeah.

"The Court: I don't want to put the city on the record, but you told my bailiff so I know where you live. The friends and family of the defendant live nowhere near there.

"Juror No. 5: Okay. And also where I work, like the other side of this city.

"The Court: Okay. Well, you're a sworn juror and so I'm not going to let you off the jury. So the information you gave me about your home you shouldn't be concerned about.

"Juror No. 5: And the city I work in. I mean, I just don't feel comfortable, and I let him know and I'm letting you know. I just don't feel comfortable.

"The Court: You should have told us that when we were picking the jury. Now that you're a sworn juror, we can't just excuse you because you don't feel comfortable. A lot of jurors indicated they don't feel comfortable being here.

"Juror No. 5: That is my main concern and I could go down the list, and I'm not going to go down the list.

"The Court: Why didn't you do that when we were picking you as jurors?

"Juror No. 5: Because I didn't want to do it then.

"The Court: Well, now it's too late.

"Juror No. 5: And there's a list of things that I could talk about, but I'm sure other people have the same problem too. But I feel that's my main concern.

"The Court: Okay. Anything else you want to tell me?

"Juror No. 5: Financial hardship. My baby is sick. It's a lot of stuff going on.

"The Court: See, you should have told me that before. There's nothing I can do now once you're a sworn juror. That's the problem. So I think tomorrow we are not going to be in session until the afternoon. Maybe that will help with the baby or with the child.

"Juror No. 5: And my rent is due next month and I'm not getting paid for this, so it's a lot of stuff going on right now.

"The Court: You do understand why I would have wanted to know that ahead of time, right? . . . . [¶] . . . [¶] I mean, telling me you just didn't tell me earlier because you just didn't tell me earlier, that's really not an answer I can deal with. [¶] So anything else you want to tell me? I'll listen.

"Juror No. 5: I just told you everything.

"The Court: Okay. All right. Let's bring all the other jurors in."

Defendant did not ask the court to discharge Juror No. 5 or declare a mistrial, or to take any other action. As far as the record reveals, Juror No. 5 did not thereafter inform

the court that she felt she could not be fair, and she remained on the jury for the balance of the trial.

Defendant contends Juror No. 5 committed misconduct by failing to disclose her apparent bias and the trial court erred by failing to discharge her, resulting in a violation of his right to an impartial jury.

We agree that Juror No. 5's failure to disclose during voir dire her claimed bias against defendant was misconduct that deprived defendant of the opportunity to exercise a peremptory challenge against her. She should have asked to address the court privately before the jury was sworn. But after Juror No. 5 revealed her bias to the court, defendant never asked the court to discharge her, and he therefore forfeited his appellate claim. (*People v. Lewis* (2009) 46 Cal.4th 1255, 1308 [forfeiture where defendant seemed satisfied and failed to object to continued service of a juror who told her husband of her frustration with the foreperson's conduct during deliberations]; *People v. Stanley* (2006) 39 Cal.4th 913, 950 [forfeiture where defendant failed to object to continued service of a juror who read a newspaper article about trial disclosing matters not presented to the jury]; *People v. Holloway* (2004) 33 Cal.4th 96, 124 [forfeiture where defendant failed to object to continued service of a juror who repeatedly asked for photos not introduced at trial and discussed the court's denial of the requests with another juror]; *People v. Gallego* (1990) 52 Cal.3d 115, 188 [forfeiture where defendant failed to object to continued service of a juror who read an article about the defendant and a juror who was told about the article].) It appears from the above-quoted exchange that at the conclusion of the inquiry both the court and counsel were satisfied that the juror was not actually or potentially biased.

Even if defendant's claim had not been forfeited, it would fail.

"A court on notice of the possibility of juror misconduct must undertake an inquiry sufficient '"to determine if the juror should be discharged and whether the impartiality of other jurors had been affected."' [Citation.]" (*People v. Espinoza* (1992) 3 Cal.4th 806, 822.) Here, the trial court conducted such an inquiry when it questioned Juror No. 5 as to her possible bias. She said she was concerned because some of

defendant's friends or relatives might live near where she lived. When told they lived "nowhere near" there, she pressed on, saying she still did not "feel comfortable" because they might live near where she worked. (Juror No. 5 apparently did not know where defendant's friends and relatives lived.) Juror No. 5 offered no other reason for bias against defendant and admitted she had told the judge "everything." The court's investigation was thus essentially complete.

The trial court's inquiry was reasonably calculated to elicit from Juror No. 5 all relevant information, and the court was not required to press for greater detail after Juror No. 5 said she had disclosed everything. The investigation enabled the trial court (and defense counsel) to reasonably conclude no substantial likelihood, or even reasonable possibility, of actual bias existed. Juror No. 5 provided no cause for her purported concern beyond the possibility that defendant's friends and relatives might live near where she worked. She gave no explanation for remaining silent when asked during voir dire whether she harbored any such bias and, when pressed further, raised additional concerns—her financial hardship and sick baby—in such a belated and perfunctory manner as to cast doubt on their urgency. The trial court was well within its discretion to conclude not only that no actual bias existed, but also that Juror No. 5's professed bias was a pretense adopted to obtain release from jury service.

Defendant argues Juror No. 5's statement that she was "sure other people ha[d] the same problem too" required additional inquiry of those jurors for possible bias. The argument is without merit. First, the statement is ambiguous, as it appears to refer to Juror No. 5's "list" of reasons why she did not want to be on a jury, not to her professed bias against defendant. Even if she was referring to bias, she gave no basis for the proposition that other jurors would by biased. On the contrary, all prospective jurors were asked if they harbored any bias against defendant, and those expressing a reason for bias were excused for cause. Juror No. 5's ambiguous, foundationless statement that other jurors might be biased did not obligate the trial court to re-conduct its inquiry.

B. Firearm Enhancement

Defendant contends the trial court erred in imposing a consecutive three-year sentence enhancement pursuant to section 12022, subdivision (d). The People concede the point, and we agree.

In 2010, subdivision (d) of section 12022 provided that when an unarmed principal in the commission of a drug offense knows that another principal in the crime is armed, he or she shall be punished by an additional and consecutive term of one, two or three years in prison.[1] Here the trial court applied subdivision (d) and imposed an additional, consecutive three year sentence on count 6 and two consecutive eight-month terms (one third the two-year middle term) on counts 7 and 8. This was error because the robbery and attempted robbery were not drug offenses. The proper enhancement was set forth in former subdivision (a), which provided that when an unarmed principal in the commission of a felony or attempted felony knows that another principal in the crime is armed, he or she shall be punished by an additional and consecutive term of one year in prison.[2] The jury was instructed on this latter point of law and the verdict form

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[1] Former subdivision (d) of section 12022 provided: "Notwithstanding the enhancement set forth in subdivision (a), any person who is not personally armed with a firearm who, knowing that another principal is personally armed with a firearm, is a principal in the commission of an offense or attempted offense specified in subdivision (c), shall be punished by an additional and consecutive term of imprisonment in the state prison for one, two, or three years." Former subdivision (c) provided: "Notwithstanding the enhancement set forth in subdivision (a), any person who is personally armed with a firearm in the commission of a violation or attempted violation of Section 11351, 11351.5, 11352, 11366.5, 11366.6, 11378, 11378.5, 11379, 11379.5, or 11379.6 of the Health and Safety Code, shall be punished by an additional and consecutive term of imprisonment in the state prison for three, four, or five years."

[2] Former subdivision (a)(1) of section 12022 provided in pertinent part: "Except as provided in subdivisions (c) and (d), any person who is armed with a firearm in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of . . . one year . . . . This additional term shall apply to any person who is a principal in the commission of a felony or attempted felony if one or more of the principals is armed with a firearm, whether or not the person is personally armed with a firearm."

substantively tracked former subdivision (a) even though it nominally referenced former subdivision (d). No reference was made in either the instructions or verdict form to drug offenses.

The People concede that defendant's sentence was enhanced under the wrong subdivision of section 12022 and recommend that we reduce the enhancements from the four years, four months imposed under former subdivision (d) to one year eight months under former subdivision (a). We have power to do so under subdivision (6) of section 1181 (an appellate court may modify a judgment when the evidence shows the defendant to be guilty of a lesser included offense) and section 1260 (an appellate court may modify a judgment and reduce the punishment imposed). (*People v. Navarro* (2007) 40 Cal.4th 668, 678 [an appellate court may replace a greater offense with a lesser offense to bring the verdict in line with the evidence presented at trial].) Use of a firearm under former subdivision (a)(1) is a lesser included offense of use under former subdivision (d). (*People v. Allen* (1985) 165 Cal.App.3d 616, 627.) Defendant raises no objection to the people's recommendation, and we will adopt it. The judgment will be modified and the enhancement reduced to one year on count 6 and four months each on counts 7 and 8. (§ 1170.1 [the sentence for an enhancement on a subordinate offense shall be one third of the term imposed for that enhancement].)

C. Victim Restitution

At trial, Hitz testified defendant took "about" $150 from each of two cash registers at his T-Mobile store on January 24, 2010 and roughly estimated $5,000 was taken from the safe. Lecesne testified she thought defendant took "around" $2,500 from her store on January 31, 2010, for an estimated total of approximately $7,800 taken in the two robberies. At a postsentencing restitution hearing on April 29, 2011, the People sought $8,888.67 in restitution.[3] It supported the request with incident reports from two T-Mobile employees, Johanna Levi, who stated $6,166 was taken on January 24, and Heidi Rodriguez, who stated $2,722.67 was taken on January 31. At the hearing the prosecutor

[3] Defendant's motions to augment the record on appeal are granted.

informed the court that the reports had been given to defense counsel several weeks before the hearing. Defense counsel objected that the reports were hearsay and did not establish that T-Mobile actually lost $8,888.67. The objection was overruled, and defendant was ordered to pay $8,888.67.

Defendant contends Hitz's and Lecesne's testimony supported a restitution award of only $7,800, not $8,888.67, and in awarding the latter amount the trial court abused its discretion. We disagree.

Pursuant to the California Constitution's Victims' Bill of Rights, a crime victim is entitled to restitution in an amount sufficient to make the victim whole. (Cal. Const., Art. 1, § 28, subd. (b)(13); *People v. Mearns* (2002) 97 Cal.App.4th 493, 501.) A commercial entity may be a "victim" for purposes of restitution. (§ 1202.4, subd. (k)(2).)

Upon a person being convicted of a crime, the court shall order the defendant to pay restitution. (§ 1202.4, subd. (a)(3)(B).) The restitution "shall be of a dollar amount that is sufficient to fully reimburse the victim or victims for every determined economic loss incurred as the result of the defendant's criminal conduct . . . ." (§ 1202.4, subd. (f)(3).) Recoverable economic losses include the value of stolen property, lost wages or profits, interest at a rate of 10 percent per year from the date of sentencing, and costs of collection. (§ 1202.4, subds. (f)(3)(A, E, G & H.) The amount shall be "established by court order, *based on the amount of loss claimed by the victim* or victims or any other showing to the court." (§ 1202.4, subd. (f), italics added.) "[T]he standard of proof at a restitution hearing is by a preponderance of the evidence, not proof beyond a reasonable doubt." (*People v. Baker* (2005) 126 Cal.App.4th 463, 469.)

An order imposing restitution is reviewed for abuse of discretion. (*People v. Giordano* (2007) 42 Cal.4th 644, 663-664.) """"When there is a factual and rational basis for the amount of restitution ordered by the trial court, no abuse of discretion will be found by the reviewing court.""""" (*People v. Baker*, *supra*, 157 Cal.App.4th at p. 467.)

In ordering defendant to pay $8,888.67 in restitution, the trial court relied on the testimony of Hitz and Lecesne and the recommendation of the prosecution, which itself merely relayed T-Mobile's claims. This evidence formed a factual and rational basis for

the award. The $6,166 that T-Mobile claimed was taken during the first robbery coincided with Hitz's testimony that "about" $150 was taken from each of two cash registers and roughly $5,000 from the safe. The $2,722.67 T-Mobile claimed was taken during the second robbery coincided with Lecesne's testimony that defendant took "around" $2500.

Defendant argues the incident reports produced at the restitution hearing were inadmissible hearsay. (Evid. Code, § 1200.) Defendant notes that neither report was made under penalty of perjury and neither employee was called to testify to the amount of T-Mobile's losses. He acknowledged that a defendant bears the burden of proving that the amount of restitution claimed is excessive (*People v. Prosser* (2007) 157 Cal.App.4th 682, 691) but argues he was not required to do so here because the hearsay reports did not establish the amount of loss (*People v. Vournazos* (1988) 198 Cal.App.3d 948, 958-959). He argues the only admissible evidence of T-Mobile's losses was the testimony of Hitz and Lecesne, who indicated T-Mobile's losses were approximately $7,800, and the trial court therefore had no discretion to award a higher amount.

The Attorney General argues that a trial court need not adhere to rules of evidence in a restitution hearing, citing a statement that first appeared in *People v. Baumann* (1985) 176 Cal.App.3d 67: "'Due process does not require a judge to draw sentencing information through the narrow net of courtroom evidence rules . . . sentencing judges are given virtually unlimited discretion as to the kind of information they can consider and the source from whence it comes.'" (*Id*. at p. 81, quoting Campbell, Law of Sentencing (1978) § 85, p. 275, fns. omitted.) The workhorse of the Attorney General's argument is *People v. Gemelli* (2008) 161 Cal.App.4th 1539, in which the trial court awarded restitution as a condition of probation. The only evidence of the victim's economic loss was a probation report that relayed the victim's damages claim. (*Id*. at pp. 1541-1542.) Division Two of the Fourth District held the trial court was entitled to rely on hearsay contained in the probation report to fix the amount of restitution awarded. (*Id*. at p. 1544.) It expressly disagreed with *People v. Vournazos*, in which Justice Lillie, then in Division Seven of this District, held the recommendation of a probation officer, which in

turn was based solely on the victim's statement of loss, did not establish the amount of loss. (*People v. Gemelli*, at p. 1543, discussing *People v. Vournazos*, *supra*, 198 Cal.App.3d at pp. 958-959.)

We need not wade too far into this dispute to resolve the question presented in this case. We will note, however, that the rules of evidence apply in all criminal proceedings, including restitution hearings. (Evid. Code, §§ 300 [the Evidence Code applies in every action], 105 ["action" means civil and criminal actions], 130 ["criminal action" includes criminal proceedings].) We also note that *People v. Baumann* and *People v. Gemelli* were both probation cases, in which context the trial court enjoys broad discretion to "impose and require any or all" of several defined "terms of imprisonment, fine, and conditions, and other reasonable conditions, as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and generally and specifically for the reformation and rehabilitation of the probationer . . . ." (§ 1203.1, subd. (j).) Restitution as a condition of probation need not be limited to the direct consequences of the defendant's crime. (*People v. Lent* (1975) 15 Cal.3d 481, 486; *People v. Whisenand* (1995) 37 Cal.App.4th 1383, 1391.) In contrast, when, as here, probation has been denied, section 1202.4 permits the court to award only such restitution as will reimburse the victim for its economic loss. The amount of loss cannot be established by hearsay evidence.

But here the award was supported by nonhearsay—the testimony of Hitz and Lecesne and the *nonhearsay* portions of T-Mobile's incident reports. Although Hitz's and Lecesne's testimony did not establish the exact amount of T-Mobile's loss, it gave a rough estimate and the incident reports set forth T-Mobile's *claimed* losses. Section 1202.4 expressly authorizes the court to consider the victim's claim of loss when determining the amount of restitution to award. Although here the incident reports were inadmissible to establish T-Mobile's loss of exactly $8,888.67, they were admissible to establish that T-Mobile *claimed* such a loss. The court was entitled to credit the claim

because it fell within the estimate offered by Hitz and Lecesne. It then fell to defendant to rebut the inference, which he made no attempt to do.

Moreover, T-Mobile was also entitled to legal interest on its loss at 10 percent, which would have raised the award to approximately $8,800 even if the court had credited only Hitz's and Lecesne's testimony and disregarded T-Mobile's claim. Under the circumstances, we would be unable to conclude the trial court abused its discretion by ordering defendant to pay $8,888.67.

DISPOSITION

The convictions are modified as above directed and as so modified are affirmed. The trial court is directed to amend the abstract of judgment to reflect a consecutive sentence enhancement of one year on count 6 and four months each on counts 7 and 8, for a total sentence reduced from 29 years eight months to 27 years. In all other respects the judgment is affirmed. The superior court is directed to prepare an amended abstract of judgment to reflect the judgment as modified and forward a copy thereof to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

MALLANO, P. J.

ROTHSCHILD, J.